



Providing Background Information to Adoptive Parents: A Bulletin for Professionals

Why is complete background information important?

Providing complete background information benefits the child, the adoptive family, and the adoption agency.

- **It helps the prospective adoptive family make an informed decision.** Families who know a child's complete medical, social, and placement history are better able to make an informed decision about whether they are emotionally and financially prepared to meet the child's needs. Full disclosure, or telling prospective adoptive families everything an agency knows about a child, also helps a family plan for a child's placement and reduces the risk of adoption disruption or dissolution.
- **It ensures the child is placed in an environment that can meet his or her needs.** The social worker's and the prospective adoptive family's knowledge of a child's health, social history, and placement history can facilitate early diagnosis and treatment if needed. Accurate background information and diagnosis may also enable a child to qualify for Federal and State adoption subsidies for children with special needs.
- **It ensures the adopted person has full and accurate knowledge of his or her family, medical, and genetic history.**¹ Many adult adoptees do not have access to medical and family information that others, who are not adopted, take for granted. When planning a family or dealing with medical or psychiatric emergencies, knowledge of one's background is crucial.
- **It helps protect agencies and intermediaries from "wrongful adoption" lawsuits.** Agencies have been held liable by the courts in "wrongful adoption" lawsuits for intentionally misrepresenting, deliberately concealing, or negligently disclosing a child's background information to adoptive parents. Full disclosure can guard against such lawsuits.

What is wrongful adoption?

The Ohio Supreme Court first recognized "wrongful adoption" in 1986 as a valid reason for adoptive parents to file a lawsuit against an adoption agency. In that case, the court found that the agency failed to disclose or misrepresented the health status or background of an adopted child at the time the child was placed. Since that time, a number of adoptive parents have won monetary awards from adoption agencies or

¹ Regulations issued as a result of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which went into effect April 14, 2003, may impact the information agencies may share about birth parents' health histories. Agencies should consult with legal counsel regarding applicable State and Federal laws and regulations.

How can wrongful adoption liability be minimized?

intermediaries based on wrongful adoption findings, and appellate courts in at least 10 States have specifically recognized some form of wrongful adoption.²

In all cases, wrongful adoption liability has been based on either **fraud** or **negligence**.

There are two types of fraud cases:

- **Intentional misrepresentation**—Deliberately providing inaccurate material background information.
- **Deliberate concealment**—Deliberately withholding material background information.

There are two types of negligence cases:

- **Negligent misrepresentation**—Carelessly providing inaccurate material background information.
- **Negligent nondisclosure**—Carelessly failing to provide material background information.

Between 1980 and 1995, the vast majority of States adopted statutes mandating that at least some health information be provided to adoptive parents.³ These laws recognized that adoptive parents need information about a child's medical problems or behavioral issues before the adoption takes place.⁴ Agencies and intermediaries can begin by identifying the requirements of their State law (if there is one) and implementing a policy to meet those requirements. However, merely *meeting* the State's statutory requirements may not be enough to guard against wrongful adoption claims. Courts have rejected agency's defenses that disclosure was not currently required by State statute.⁵ Agencies and intermediaries can minimize their exposure to liability for wrongful adoption by taking the following steps in keeping with their State's statutes and administrative regulations:

Obtain and Disclose "Material Information" on the Adopted Child's History.

Material information is any information that might be helpful to a prospective adoptive parent in deciding whether to adopt a particular child. (Wrongful adoption cases have considered birth parents' physical and mental health histories and a child's history of emotional or behavioral problems to be "material" information.) The majority of States have enacted statutes requiring the full disclosure of a child's social history and medical information to prospective adoptive parents.⁶ In addition, some States have more detailed requirements in State regulations or licensing requirements.⁷ In many States, the duty (either explicitly or implicitly by statute) to use "reasonable efforts"⁸ to obtain background information and disclose health information may also extend to an attorney who serves as an intermediary or files a petition for adoption.⁹ The purpose of these laws and regulations is to protect children and their families from harm arising from

² Leshne, p. 14.

³ Blair, p. 51.

⁴ Leshne, p. 17.

⁵ Blair, p. 145.

⁶ Blair, p. 126.

⁷ Blair, p. 83.

⁸ States define "reasonable efforts" differently. Check your State's statute or consult with an adoption attorney to understand your State's definition of reasonable efforts.

⁹ Blair, p. 116.

incomplete and inaccurate disclosure. Questions to consider when researching a child's background include:

- What would I want to know if I were adopting this child?
- Have I satisfied the legal requirements of my State?
- Have I used reasonable efforts to obtain as much background information on this child as I can?

Develop Clear Policies and Guidelines on the Collection and Disclosure of Social and Family Background Information. Ensure that, at a minimum, agency policies regarding information collection and disclosure meet your State's legal requirements. Standardize protocols for collection and disclosure to ensure all necessary records and evaluations are obtained, and provide clear guidelines to caseworkers carrying out these protocols.¹⁰ Clear guidelines are also necessary regarding disclosure of potentially life-threatening illnesses such as HIV/AIDS or genetic predispositions.¹¹ To collect information, agencies may wish to review hospital or other health care records, use birth parent medical questionnaires, and ensure that children have regular physical examinations.

Provide Adoptive Parents With Written Disclosure of Background and Health Information. Disclosure should be made in writing prior to a child's placement for adoption. One adoption expert suggests agencies should have both prospective adoptive parents (if a couple) sign reports documenting a child's health and background information in the presence of two agency personnel. One copy of the report should go to the parents, one to the agency, and one to the court file to document the disclosure.¹² Whenever possible, agencies should provide actual copies of reports, assessments, or other documents, rather than summarizing the material. Errors in transcription can alter the meaning and leave the agency open to liability due to negligence.

Educate Prospective Adoptive Parents About the Limitations of Information-Gathering and Disclosure. Agencies should explain to families that in virtually every case there is information that the agency may not know. See the National Adoption Information Clearinghouse's *Obtaining Background Information: A Fact Sheet for Families*. Agencies should identify any areas where information is known to be missing and explain that all existing information may not have been discovered. For example, children who have been sexually abused may not feel comfortable telling anyone about the abuse until they are in a safe, stable environment. Indeed, an adoptive parent may be the very first person a child feels comfortable talking to about an incident of sexual abuse.

Heighten Adoptive Parents' Awareness of the Risks of Adoption. The law in most States indicates an agency is not a guarantor of a child's health.¹³ Agencies can clearly communicate to prospective adoptive parents that adoption, just like any other form of parenting, involves risks. It simply is not possible to predict a child's future health.

Make Staff Training a Priority. Agencies should ensure staff members are thoroughly familiar with standards of quality practice in collecting and communicating health and other background information. Agency staff should have skills in working with birth

¹⁰ Blair, p. 147.

¹¹ Freundlich & Peterson, p. 506.

¹² Blair, p. 147.

¹³ Leshne, p. 15.

What about international adoptions when agencies have little or no information?

How can agencies ensure families understand the impact of background information?

families to obtain the needed health and background information and in fully and accurately conveying that information to prospective adoptive families.¹⁴ Agencies should offer training in medical and genetic topics to facilitate better understanding of the health information.¹⁵

Obtain Appropriate Liability Insurance. Agencies should review the substance and scope of their liability insurance to ensure they have general liability and umbrella clauses, as well as professional liability to protect their staff in the event of claims related to professional services rendered. Directors' and officers' liability insurance should cover negligence. Agencies may also wish to negotiate for defense costs to be covered in the event of a fraud claim, and for the right to select one's own defense counsel. (Typically, when insurance companies choose defense counsel, they select attorneys with little or no experience in the area of adoption.) Membership organizations such as the Child Welfare League of America (CWLA) or National Association of Social Workers will provide insurance or information as to where to obtain such insurance. Check with the National Adoption Information Clearinghouse, naic@calib.com or (888) 251-0075, for current resources for liability insurance.

In some countries, particularly where children have been institutionalized since birth in orphanages, full medical records may not be available. Translation problems, cultural differences, and differences in medical systems can make it difficult to interpret the information that is available. In some instances there may be no information at all regarding a child's social and medical history. Some intercountry adoption facilitators provide a summary of a child's health and social records rather than the full record.¹⁶

Agencies can only guarantee that the information they do have is disclosed. Most agencies avoid liability for wrongful adoption in international situations by clearly communicating in writing the limitations (in quantity and reliability) of information made available to them.

Some adoption professionals suggest social workers implement practices to help prospective families develop an understanding of the possible impact of a child's history, particularly with children adopted from foster care. One such practice involves the social worker, at the time a child is first presented to a family, providing the family with a written description of the critical events of the child's life (such as abuse/neglect or removal from birth parents). The adoptive family is then asked to write down their thoughts on the following questions:

- What messages or beliefs (about parents, themselves, the world, social workers, adults, etc.) might a child have learned from his or her experiences?
- What might be the expected feelings and behaviors of a child who believes these things?
- What are the pervasive themes in this child's life?
- What new messages might parents want to give this child?¹⁷

¹⁴ Freundlich & Peterson, p. 508.

¹⁵ Blair, p. 16.

¹⁶ Leshne, p. 14.

¹⁷ Edwards.

What questions remain unanswered?

This process can be repeated during the visiting phase of placement and again when the child moves into the home. After the child has been with the family for a month, the social worker can review with the family their thoughts at each stage of the placement process.¹⁸ This process should be supported with referrals for specific post-placement and post-legal adoption services, as needed. Providing adoptive parents with opportunities to anticipate the possible impact on children of previous experiences helps to educate the prospective family, helps ensure that they are connected with needed services, and documents that the agency shared key background information with the family.

Experts seem to agree that adoption agencies and professionals have a duty to disclose what they know about children to prospective families. However, a number of questions remain regarding the extent of that responsibility.

The Duty to Investigate. As of February 2003, no court had held that an agency has a duty to investigate (or a duty to ensure that all the background information is received and is correct). Liability may be possible, however, if an agency fails to meet a specific standard of effort, as mandated by State statute, in obtaining medical or other history.¹⁹ Some legal experts advocate incorporating the duty to investigate into statute; however, others warn this practice might compromise casework with birth families, discourage birth parents from considering adoption due to privacy concerns, and create a situation in which agencies cannot be certain when they have sufficiently "investigated" and may conclude such efforts.²⁰

Communicating Facts vs. Suspicion. In some cases, in an attempt to avoid wrongful adoption liability, agencies share not only known information but also information they suspect or infer from statements made by the birth parents. This practice raises a range of ethical and practice issues related to improperly labeling a child, potentially delaying an adoptive placement, and providing possibly inaccurate information to prospective adoptive parents.²¹ The line between fact and suspicion may be difficult to draw but should be carefully considered when conveying background information.

Genetic Testing of Children. An issue of ongoing debate is whether presymptomatic testing to determine the existence of genetic diseases or conditions should be conducted on children who are available for adoption. Some professionals see genetic testing as an opportunity to expand the information that can be provided to prospective adoptive parents, but others warn that this practice violates the rights of children, subjects children to testing for reasons other than their own health needs, and could create new and higher standards of agency liability.²²

Interpreting Background Information. Though they often lack the requisite expertise to do so, social workers may be tempted to interpret background information for prospective adoptive parents. They may feel pressured to do this because of prospective parents' concerns, or they may simply wish to help prospective parents better understand the background information they are given. Wrongful adoption cases counsel

¹⁸ Ziegler, p. 4.

¹⁹ Blair, p. 16.

²⁰ Freundlich & Peterson, p. 510.

²¹ Freundlich & Peterson, p. 510.

²² Lorandos, 1996; Freundlich & Peterson, p. 511.

Where can I go for more information?

against such a practice. Staff generally should not offer interpretations, but rather should refer prospective parents to independent experts or other resources.²³

Communication of New Information After Finalization. Some States have established central registries that allow birth parents to provide updated health information after finalization. As of this printing, neither birth parents nor agencies have a legal duty to update information. Some have advocated that agencies comply with the professional responsibility (if not legal duty) to provide information acquired after finalization directly to adoptive families.²⁴

INTERNET RESOURCES

National Adoption Information Clearinghouse

The fact sheet, *Obtaining Background Information on Your Prospective Adopted Child* (naic.acf.hhs.gov/pubs/h_wrong.cfm), provides further information. The *Statutes-at-a-Glance* (naic.acf.hhs.gov/laws/index.cfm) series highlights specific topics and provides a quick overview and comparison of legal requirements across the States.

National Resource Center for Special Needs Adoption

Back issues of their newsletter, *The Roundtable* (www.nrcadoption.org/roundtable.html), can be obtained through the Web site. This publication regularly has articles relating to children who have been adopted from foster care. Volume 10, #1 has an article for social workers by Kay Donley Ziegler regarding sharing children's background information (disclosure).

Child Welfare League of America's Standards of Excellence for Adoption Services

This publication (www.cwla.org/programs/adoption/cwla_standards.htm) outlines CWLA's recommendations for thorough investigation of medical, developmental, psychological, and family history, and full disclosure of this information to adoptive parents. These standards also address issues of disclosure to adopted individuals and disclosure of a child's positive HIV status.

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²³ Freundlich & Peterson, p. 511.

²⁴ Freundlich & Peterson, p. 512.

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